Supreme Court, U.S.
FILED
FEB 15 1991
OFFICE OF THE CLERK

No. 90-50

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

ELLIS GREGORY, JR., et al.,
Petitioners,
v.
JOHN D. ASHCROFT,
Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE
EIGHTH CIRCUIT

BRIEF FOR AMICI CURIAE COLORADO, FLORIDA, HAWAII, MASSACHUSETTS, MINNESOTA, NEBRASKA, NEW JERSEY, NORTH DAKOTA, PENNSYLVANIA, PUERTO RICO, RHODE ISLAND, SOUTH CAROLINA, and WYOMING SUPPORTING RESPONDENT.

SCOTT HARSHBARGER
ATTORNEY GENERAL

COMMONWEALTH OF
MASSACHUSETTS

H. Reed Witherby
Special Assistant
Attorney General

Thomas A. Barnico
Assistant Attorney General
Counsel of Record
One Ashburton Place
Boston, MA 02108
(617) 727-2200

[SEE INSIDE COVER FOR ADD'L COUNSEL]

GALE A. NORTON, Attorney General
State of Colorado

ROBERT A. BUTTERWORTH, Attorney General
State of Florida

WARREN PRICE, III, Attorney General
State of Hawaii

HUBERT H. HUMPHREY, III, Attorney General
State of Minnesota

DONALD STENBERG, Attorney General
State of Nebraska

ROBERT J. DELTUFO, Attorney General
State of New Jersey

NICHOLAS J. SPAETH, Attorney General
State of North Dakota

ERNEST D. PREATE, JR., Attorney General
Commonwealth of Pennsylvania

HECTOR RIVERA-CRUZ, Attorney General
Commonwealth of Puerto Rico

JAMES E. O'NEIL, Attorney General
State of Rhode Island

T. TRAVIS MEDLOCK, Attorney General
State of South Carolina

JOSEPH B. MEYER, Attorney General
State of Wyoming

TABLE OF CONTENTS

	Page
INTEREST OF AMICI	1
SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. CONSTITUTIONAL PRINCIPLES REQUIRE THAT CONGRESS CLEARLY STATE ITS INTENT TO PREEMPT STATE JUDICIAL TENURE PROVISIONS. IT HAS NOT DONE SO.	6
A. A Clear Statement Of Congressional Intent Is Always Required For Alteration Of The Federal-State Balance. Here, It Is Constitutionally Required.	7
B. Congress Has Not Clearly Stated Any Intent To Preempt The States' Choices For The Tenure Of Their Judges.	14
II. THE PETITIONERS' PROPOSED INTERPRETATION WOULD RAISE SERIOUS CONSTITUTIONAL QUESTIONS. IT SHOULD THEREFORE BE REJECTED.	25
CONCLUSION	36

TABLE OF AUTHORITIES

Cases	Page
Apkin v. Treasurer & Receiver-General, 401 Mass. 427, 517 N.E.2d 141 (1988)	13, 19, 21n
Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985)	9
Coyle v. Oklahoma, 221 U.S. 559 (1911)	25
DeBartolo Corp. v. Florida Gulf Coast Trades Council, 485 U.S. 568 (1988)	32, 33
Dellmuth v. Muth, 491 U.S._____, 105 L. Ed.2d 181 (1989)	9, 18
EEOC v. Commonwealth of Massachusetts, 680 F. Supp. 455 (D. Mass.), aff'd, 858 F.2d 52 (1st Cir. 1988)	18, 20
EEOC v. Commonwealth of Massachusetts, 858 F.2d 52 (1st Cir. 1988)	13, 21, 4n, 35
EEOC v. State of Illinois, 721 F. Supp. 156 (N.D. Ill. 1989)	35n
EEOC v. Wyoming, 460 U.S. 226 (1983)	24, 31n, 33
FERC v. Mississippi, 456 U.S. 742 (1982)	26n
Florida Avocado Growers v. Paul, 373 U.S. 132 (1963)	7
Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985)	passim
Gondelman v. Commonwealth of Pennsylvania, 550 A.2d 814 (Pa. Cmwlth. 1988), aff'd on other grounds, 554 A.2d 896 (Pa. 1989)	35n
Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707 (1985)	8
In Re Stout, 559 A.2d 489 (Pa. 1989)	35n
Jones v. Rath Packing Co., 430 U.S. 519 (1977)	8
Maresca v. Cuomo, 475 N.E.2d 99, 485 N.Y.S.2d 724 (N.Y. 1984), app. dismissed, 474 U.S. 802 (1985)	34n
Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976)	34n

National League of Cities v. Usery, 426 U.S. 833 (1976) 26, 27, 28

New York Department of Social Services v. Dublino, 413 U.S. 405 (1973) 10

NLRB v. Catholic Bishop, 440 U.S. 490 (1974) 32

Oregon v. Mitchell, 400 U.S. 112 (1970) 33-34n

Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981) 10

Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. ___, 109 L. Ed 2d 264 (1990) 9

Rice v. Sante Fe Elevator Corp., 331 U.S. 218 (1947) 8

South Carolina v. Baker, 485 U.S. 505 (1988) 26n

Sugarman v. Dougall, 413 U.S. 634 (1973) 30, 31n

Texas v. White, 74 U.S. 700 (1869) 27

United States v. Bass, 404 U.S. 336 (1971) 9, 12

Federal Constitution, Statutes and Legislative Materials

U.S. Const. Art. IV, § 4 30

U.S. Const., Tenth Amendment 30

U.S. Const., Fourteenth Amendment, § 5 33

29 U.S.C. §§ 201 et seq. 22

29 U.S.C. § 630(f) 16, 19, 22

Pub. L. No. 93-259, 88 Stat. 55 (1974) 15

H. Rep. No. 93-913 (1974) 22

S. Rep. No. 93-690 (1974) 22

H. Rep. No. 95-527 (1978) 19

S. Rep. No. 95-493 (1978) 19

H. Rep. No. 99-241 (1986) 19

S. Rep. No. 99-146 (1986) 19

118 Cong. Rec. 1837 (1972) 21

Report of the Secretary of Labor, The Older American Worker: Age Discrimination in Employment (1965) 23

State Statutes and Constitutional Provisions

Mass. Const. Pt. I, Art. XXIX 2n

Mass. Const. Pt. I, Art. XXX 2n

Mass. Const. Pt. II, Ch. 2, Sec. 1, art. 9 2n

Mass. Const. Pt. II, Ch. 3, art. 1 2n

Miscellaneous

The Federalist (Mentor ed. 1961)

No. 17 30n
No. 45 30n
No. 46 30n
No. 51 30n

Field, Garcia v. San Antonio Metropolitan Authority: The Demise of a Misguided Doctrine, 99 Harv. L. Rev. 84 (1985) 27, 31

Odom, The Tenth Amendment After Garcia: Process-Based Procedural Protections, 135 U. Pa. L. Rev. 1657 (1987) 12

L. Tribe, American Constitutional Law (2d ed. 1988) 13, 28, 29, 31

No. 90-50

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

ELLIS GREGORY, JR., et al.,
Petitioners,

v.

JOHN D. ASHCROFT,
Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE
EIGHTH CIRCUIT

Interest of Amici

Amici are States concerned about maintaining the constitutional principles governing the federal-state balance. They file this brief to address the constitutional implications of petitioners' claim that Congress has purported to regulate the tenure of appointed state judges.

Some of the amici States will be affected immediately by this Court's decision in this case, because their judges are appointed and must retire upon attaining a certain age. Such requirements generally are set forth in the provisions of state constitutions which create the framework of state government and provide for the selection and tenure of state constitutional officers.[1/]

Other amici States elect, rather than appoint, their judges, or do not provide for their mandatory retirement on the basis of age. Those States nevertheless join in this brief because of the importance of the decision in this case to the constitutional principles protecting the authority of the States to govern themselves independently.[2/]

1/ The Massachusetts Constitution, for example, has governed the selection and tenure of judges since the people of the Commonwealth established the judiciary as an independent branch of government in 1780. See Mass. Const. Pt. I, Art. XXIX (right of every citizen to judicial impartiality and independence); Pt. I, Art. XXX (powers of government separate "to the end that it may be a government of laws and not of men"); Pt. II, Ch. 2, sec. 1, art. 9 (judicial officers appointed by the Governor with the consent of the Executive Council); Pt. II, Ch. 3, art. 1 (judicial tenure).

SUMMARY OF ARGUMENT

I(A). Under Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), the main protection for the States' independent existence lies in the national political process. In order to ensure that this protection is effective, it is essential that this Court require a clear statement of congressional intent before construing

2/ For the Court's convenience, the judicial tenure and selection provisions of the amici States other than Massachusetts are set forth in an addendum to this brief.

federal legislation to preempt state sovereignty. The clear statement rule guarantees that Congress has in fact faced the preemption issue squarely and that the federal-state balance is not disturbed inadvertently . Pp. [6-14].

I(B). Petitioners' claim that the Age Discrimination in Employment Act (ADEA) preempts state constitutions and laws governing the tenure of judges requires a clear statutory expression of congressional intent, because the asserted federal intrusion affects a fundamental and integral part of the government of the States. The ADEA in fact contains no clear statement showing that Congress intended to intrude upon state sovereignty in this area. Pp. [14-24].

II. As a rule, statutes should be construed to avoid serious constitutional questions. Petitioners' proposed interpretation of the ADEA would interfere with the States' authority over the tenure of the highest officers of the judiciary, one of the co-equal branches of state government; it is extremely doubtful that Congress has the constitutional authority to carry out such an intrusion. The Garcia decision recognized that there exist federal constitutional limits upon Congress' power to interfere with the constitutional structure of state governments. Congress did not intend to test those limits through amending the ADEA, and the statute should be construed accordingly. Pp. [25-36].

ARGUMENT

I. CONSTITUTIONAL PRINCIPLES REQUIRE THAT CONGRESS CLEARLY STATE ITS INTENT TO PREEMPT STATE JUDICIAL TENURE PROVISIONS. IT HAS NOT DONE SO.

Petitioners' principal claim is that Congress has pre-empted the choices made by Missouri -- and other States -- regarding judicial tenure by enacting a series of amendments to the Age Discrimination in Employment Act ("ADEA"). This claim strikes at the heart of state sovereignty, since it contemplates federal regulation of the tenure of constitutional officers of state governments. The petitioners' proposed interpretation would limit the authority of the States to determine matters integral to their essential framework of government. Constitutional principles of federalism require, at the very least, a clear statement of

congressional intent as a condition to finding preemption in this area.

A. A Clear Statement Of Congressional Intent Is Always Required For Alteration Of The Federal-State Balance. Here, It Is Constitutionally Required.

This Court has repeatedly held that even to preempt routine state regulation of private industry, Congress must clearly state its intent. It is fundamental that "we are not to conclude that Congress legislated ouster of [a state statute] in the absence of an unambiguous congressional mandate to that effect." Florida Avocado Growers v. Paul, 373 U.S. 132, 146-47 (1963) (concerning state regulation of the oil content in avocados). "Where . . . the field that Congress is said to have preempted has been traditionally

occupied by the States, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 715 (1985), quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977), quoting Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 230 (1947). "This assumption provides assurance that 'the federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the courts." Jones v. Rath Packing Co., supra, 430 U.S. at 525 (citation omitted). "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced,

and intended to bring into issue, the critical matters involved in the judicial decision." United States v. Bass, 404 U.S. 336, 349 (1971).

The requirement of a clear and specific statement is even more important if and when Congress intends to interfere with state interests or to abrogate rights which the States enjoy under the Constitution. E.g., Dellmuth v. Muth, 491 U.S. ___, 105 L. Ed. 2d 181, 187 (1989) (because it would upset "the fundamental constitutional balance between the Federal Government and the States," Congress may abrogate state immunity from suit in federal court only by making its intention "unmistakably clear in the language of the statute," quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985)); Port Authority Trans-Hudson Corp. v. Feeney,

495 U.S. ___, 109 L. Ed. 2d 264, 272 (1990) (same); Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 17 (1981) (Congress must "unambiguously" express its intent to impose conditions on States pursuant to federal grants); New York Department of Social Services v. Dublino, 413 U.S. 405, 413 (1973) (Social Security Act did not show "clear manifestation of intention" to preempt state regulations regarding conditions for welfare benefits); United States v. Bass, 404 U.S. 336 (1971) (federal criminal statute construed narrowly so as not to preempt state statute criminalizing same conduct).

The petitioners in this case argue that Congress has overridden the solemn choices of the people of the several States on an essential aspect of their government: the tenure of their judges.

This is an extraordinarily sensitive area in our federalist constitutional structure and our democratic form of government. It requires a correspondingly clear statement of Congress' intent to preempt.

The decision in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), makes the requirement of a clear statement as a condition of preemption even more compelling. In Garcia, this Court held that "the principal and basic limit on the federal commerce power is that inherent in all congressional action -- the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated." 469 U.S. at 556. The

main protection of state sovereignty after Garcia is thus the national political process, based on the assumption that the States will be able to argue their interests in the course of congressional debate. The clear statement rule is a logical and essential corollary to the Garcia decision. The process of debate and accomodation envisioned by the Garcia decision can take place only if intent to preempt is explicitly stated in legislation, so that both the States and Congress are aware of what is at issue and so that the federal balance is not disturbed inadvertently. See Bass, supra, 404 U.S. at 349; Odom, The Tenth Amendment after Garcia: Process-Based Procedural Protections, 135 U. Pa. L. Rev. 1657, 1676-77 (1987).

It would be inconsistent with Garcia's reliance upon the political process for this Court to conclude, without clear and specific evidence in the statutory language, that Congress intended to preempt the States' choices as to judicial tenure. See L. Tribe, American Constitutional Law § 6-26, at 480 (2d ed. 1988) ("[T]o give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which Garcia relied to protect states' interests"). Without a clear statement demonstrating that Congress has faced and decided the issue, the courts should not hold that federal legislation has interfered with state autonomy. See EEOC v. Commonwealth of Massachusetts, 858 F.2d 52, 53-54, 58 (1st Cir. 1988); Apkin v. Treasurer &

Receiver-General, 401 Mass. 427, 431, 517 N.E.2d 141, 143-146 (1988) (both applying a clear statement rule in upholding a judicial mandatory retirement provision against ADEA attack).

B. Congress Has Not Clearly Expressed An Intent To Preempt The States' Choices Concerning The Tenure Of Their Judges.

Petitioners assert that Congress chose to limit the States' freedom to make their own choices concerning judicial tenure by amending the ADEA in 1974. This argument is made even though the alleged conflict between state and federal laws was, at that time, only theoretical. Moreover, there is no evidence that Congress in fact faced, and intended to decide, the critical issues involved in the question presented to the Court in this case.

Indeed, the language and history of the ADEA amendments make it quite clear that Congress did not decide to intrude upon the States' choices as to judicial tenure.

The language of the ADEA defines its coverage in broad and general terms; there is no specific reference whatever the judiciary. Indeed, the 1974 amendment to the ADEA is notable for its lack of specificity. The amendment did enlarge the definition of the term "employer" to include "a State or political subdivision of a State," Pub. L. No. 93-259, § 28, 88 Stat. 55 (1974), but the law makes no reference to any particular branch of government, let alone to the state judiciary. Thus, although the petitioners argue that the very generality of the 1974 amendment extends the ADEA to judges, there is no

specific evidence in its language that Congress intended to do so.

Congress did insert in this definition exceptions for elected officials, for their close advisors, and for appointees on the policymaking level. See 29 U.S.C. § 630(f). These exceptions indicate that Congress did not intend to test the limits of its constitutional authority at the expense of state sovereignty, but rather that it wished to avoid infringing upon the States' independent authority over the structure of their governments.

Moreover, the petitioners' interpretation of the ADEA would produce an anomalous result. Those States that appoint judges would be prohibited from enforcing their mandatory judicial retirement provisions, but States that elect their judges would not be so

prohibited, because of the elected official exception. It is extremely unlikely that Congress intended that the ADEA apply so inconsistently to state judiciaries. This anomaly was highlighted by Judge Keeton in a recent decision:

> The underlying concerns manifested by the adoption of this exception emphatically do not include a congressional interest in taking sides on the currently active controversy within many states about whether judges shall be elected or appointed. Yet, plaintiff's proposed reading of the statute would introduce into the political dispute on this controversial issue of state government a federally-imposed factor significantly weighing against a choice by the state electorate to have state judges appointed. Is it a reasonable interpretation of this definition of "employee" that the Act was designed to accomplish this rather significant intrusion into state political choices? Quite apart from other concerns addressed below, an affirmative answer hardly seems defensible.

EEOC v. Commonwealth of Massachusetts, 680 F. Supp. 455, 461 (D. Mass.), aff'd, 858 F.2d 52 (1st Cir. 1988). The clear statement rule requires that Congress express its clear intention "in unmistakable language in the statute itself," Dellmuth, supra, 105 L. Ed. 2d at 187, which it plainly did not do in this case.

Petitioners nevertheless suggest that legislative history can show an intent to preempt. But even if the history of an otherwise ambiguous statute could establish preemption, it would not do so in this case.

The legislative history of the 1986 amendment to the ADEA, which eliminated the age-seventy cap and thereby gave rise to the asserted conflict between the ADEA and state judicial mandatory retirement provisions, does not even

mention the applicability of the ADEA to state judges. There is no discussion whatsoever of the impact of the amendment on the state judiciary. See H. Rep. No. 95-527 (1978); S. Rep. No. 95-493 (1978); H. Rep. No. 99-241 (1986); S. Rep. No. 99-146 (1986). As the Massachusetts Supreme Judicial Court observed, after scrutinizing the relevant legislative records: "It seems clear that Congress did not even consider the consequences of the 1986 amendment on the State judiciary." Apkin, supra, 401 Mass. at 435, 517 N.E. 2d at 146. Similarly, the history of section 630(f) contains no mention of any congressional decision to affect state judicial tenure. As Judge Keeton concluded: "It is simply not a credible inference that a majority of the Members of Congress, voting on this matter,

would have formed this intent [that elected judges be excepted from the ADEA and appointed judges be covered], and acted upon it, without one word of comment about it in the legislative history. For that to have happened, the issue would have had to be either noncontroversial or inconsequen- tial. It was, in fact, neither." EEOC v. Commonwealth of Massachusetts, supra, 680 F. Supp. at 464.

Because the legislative history of the ADEA does not support their claims, the petitioners rely on the history of a 1972 amendment to a different statute, Title VII. If anything, however, the legislative history of the Title VII amendment supports the contrary conclusion -- that Congress intended to exempt from federal control all "persons who exercise the legislative, executive

and judicial powers of the States." EEOC v. Commonwealth of Massachusetts, 858 F.2d 52, 55 (1st Cir. 1988), quoting 118 Cong. Rec. 1837 (1972).[3/] Moreover, amici have found no reference to Title VII in the legislative history

---

3/ Any argument that Congress intended to distinguish between elected and appointed state officials would be wrong. The relevant language of Title VII exempts both elected and appointed officials, and nowhere is there any indication of congressional awareness that it might be treating elected and appointed judges differently. Moreover, if it was Congress's intention to respect the choices made by the voters of the various States, that intention would be furthered by giving effect to popularly-voted constitutional provisions regarding the selection and tenure of state judges. See, e.g., Apkin v. Treasurer & Receiver-General, 401 Mass. at 428, 517 N.E.2d at 142 (1988) (Massachusetts mandatory retirement provision enacted by overwhelming popular vote). "This expression of choice is at least on a par with the election of a particular judge." EEOC v. Commonwealth of Massachusetts, supra, 858 F.2d at 57.

of the 1974 ADEA amendments. Instead, Congress' 1974 decision to extend the ADEA to the States was only a small part of a major piece of legislation amending the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. The ADEA amendment was described as "a logical extension of the committee's decision to extend FLSA coverage to Federal, State, and local government employees," H. Rep. No. 93-913, 93d Cong., 2d Sess. 40 (1974) (Committee on Education and Labor); S. Rep. No. 93-690, 93d Cong., 2d Sess. 55 (1974) (Committee on Labor and Public Welfare). As a result, it seems much more likely that the members of Congress thought of the scope of section 630(f), if they thought about it at all, in the context, not of Title VII, but of the FLSA.

Finally, even if it could be shown that one Congress in 1972 had intended to apply Title VII to some (but not all) state judges, that would not demonstrate that a different Congress intended to preempt the States' choices as to their judiciaries when amending the ADEA in 1974. This is particularly true where different considerations would have applied to the respective preemption determinations. These differences include variations in the scope of Congress' authority when acting under the Commerce Clause rather than the Fourteenth Amendment (see Part II, infra) as well as Congress' awareness that age discrimination is not generally characterized by the same invidiousness and malicious animus which is associated with racial discrimination. See Report of the Secretary of Labor, The Older

American Worker: Age Discrimination in Employment (1965) (submitted to Congress in connection with the original enactment of the ADEA in 1967; see EEOC v. Wyoming, 460 U.S. 226, 230-31 (1983)). Thus, the legislative history of the 1972 amendment of Title VII by another Congress does not and cannot show that the 93rd Congress, by amending the ADEA in 1974, consciously intended to preempt States' choices as to their judiciaries.

Because Congress did not clearly and specifically express any intent to preempt the States' choices as to judicial selection and tenure in the ADEA, the decision below should be affirmed.

II. THE PETITIONERS' PROPOSED INTERPRETATION WOULD RAISE SERIOUS CONSTITUTIONAL QUESTIONS. IT SHOULD THEREFORE BE REJECTED.

In Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 530-54 (1985), this Court held that state sovereignty imposes limitations on the Commerce Power primarily in a political sense. However, the Garcia Court also indicated that some judicially enforceable "fail-safe" limitations remain on congressional action, stating: "These cases do not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause." Id. at 556, citing Coyle v. Oklahoma, 221 U.S. 559 (1911) (Congress lacks power to dictate location of state

capitol).[4/] To apply the ADEA to restrict the States' choices for the tenure of their judges would exceed the remaining affirmative limits on federal preemption of state governments identified in Garcia.

Amici recognize that the attempt, in National League of Cities v. Usery, 426 U.S. 833 (1976), to draw boundaries of state immunity from federal regulation in terms of "traditional governmental functions" was overruled by Garcia. But even severe critics of National League of Cities have expressed the view that this Court should continue to limit Congressional intrusion into state

---

4/ See also South Carolina v. Baker, 485 U.S. 505, 528 (1988) (Scalia, J., concurring); id. at 530 (O'Connor, J., dissenting); FERC v. Mississippi, 456 U.S. 742, 788-797 (1982) (O'Connor, J., dissenting).

sovereignty, so as to ensure that the States retain their "separate and independent existence," Texas v. White, 74 U.S. 700, 725 (1869). The difficulty with National League of Cities was only that it attempted too much. See, e.g., Field, Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine, 99 Harv. L. Rev. 84, 111-13 (1985). A more satisfactory test for preserving the States' independent existence "would restrict immunity to essentially internal state activities. Such internal matters would include the organization of state and local governments . . . ." Id. at 105. "Even prior to National League of Cities, there was authority that the Court could step in to prevent the destruction of states. Opponents and supporters of

National League of Cities alike have endorsed this view of the judicial role in protecting the states." Id. at 112.

Another leading critic of National League of Cities similarly concludes that this Court retains responsibility to protect the States from certain forms of federal interference. "The real business of preserving federalism" is "protecting the structure of state government from federal intrusion." L. Tribe, American Constitutional Law § 5-23, at 396 (2d ed. 1988). "When we return to Justice Rehnquist's 'tacit postulates' -- the core assumptions about the structure of constitutional government, assumptions that surely include the meaningful existence of the states -- we recognize that National League of Cities may have been the wrong battle fought with the wrong tactics,

but in a campaign whose concerns were far from trivial and indeed had solid constitutional grounding." Id. at 397. The most fundamental concern should be with "federal laws that restructure the basic institutional design of the system a state's people choose for governing themselves." Id. (emphasis in original).

The citizens of the several States have variously decided, through their constitutions, the most appropriate manner to select and provide tenure to their constitutional officers, including their judges. These decisions are a vital aspect of each State's character, independent existence and role as an independent governmental entity within the constitutional system.[5/]

5/ This sort of local decisionmaking was envisioned by the Framers as one of

(footnote continued)

This Court has recognized that "[e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen." Sugarman v. Dougall, 413 U.S. 634, 647 (1973). The State has a "constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public officerholders." Id. at 648, citing U.S. Const. Art. IV, § 4 and the Tenth Amendment.6/

(footnote continued)

the main pillars of liberty. See, e.g., The Federalist, No. 17, at 119-20 (A. Hamilton), No. 45 at 192-93 (J. Madison), No. 46, at 298 (J. Madison), No. 51, at 323 (J. Madison) (Mentor ed. 1961).

6/ The distinction made between state

(footnote continued)

The intrusion upon the choices of the various States as to their form of government here attributed to Congress by petitioners may not seem to be an extreme attack upon the States' independent existence. But "it is highly unlikely that Congress will make a frontal attack on the existence of the states; far more likely is a gradual chipping away at state authority." Field, supra, 99 Harv. L. Rev. at 112. "Of course, no one expects Congress to obliterate the states, at least in one fell swoop. If there is any danger, it is in the tyranny of small decisions . . .." Tribe, supra, § 5-20, at 381.

(footnote continued)

employees and constitutional officers in Sugarman also distinguishes this case from EEOC v. Wyoming, 460 U.S. 225, 243 (1983) (which upheld the application of the ADEA to state game wardens).

Because petitioners' interpretation of the ADEA would raise serious questions regarding the limits of congressional authority to regulate state governments, the statute should not be so construed. "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." DeBartolo Corp. v. Florida Gulf Coast Trades Council, 485 U.S. 568, 575 (1988) (emphasis added); NLRB v. Catholic Bishop, 440 U.S. 490, 500-01 (1974) (before addressing difficult and sensitive constitutional questions, "there must be present the affirmative intention of Congress clearly expressed") (emphasis added).

Construing the ADEA not to apply to state judges would, consistently with the DeBartolo rule, avoid the sensitive question of the ultimate substantive limits imposed by the Tenth Amendment and the federal constitutional structure upon Congress' authority under the Commerce Clause. It would also avoid the further question, previously reserved by this Court, see EEOC v. Wyoming, 460 U.S. 226, 243 (1983), as to whether the extension of the ADEA to the States is an implicit exercise of congressional authority under section 5 of the Fourteenth Amendment.7/

7/ Although Congress has broad discretion to choose the means by which it will enforce the substantive provisions of the Fourteenth Amendment, Congress may not necessarily define or establish substantive constitutional rights. See Oregon v. Mitchell, 400 U.S. 112 (1970), holding unconstitutional a statute arguably

(footnote continued)

These serious questions may properly be avoided by construing the ADEA not to apply to state judges. Such a construction would not be "plainly contrary" to Congress' intent. See Part I(B), supra. Indeed, at least one well-respected judge, in an extended and thoughtful analysis, has concluded, without reaching the clear statement rule, that the plain meaning of the language of the ADEA excludes all state judges from coverage. EEOC v. Commonwealth of Massachusetts, supra, 680 F. Supp. at 457-462.[8/] Most other courts addressing the question, including the First Circuit, the Massachusetts Supreme Judicial Court, and the court below, have concluded that that ADEA contains no clear expression of a congressional intention to include state judges within its ambit.[9/] It would be entirely consistent with the statutory language and the legislative

---

(footnote continued)

enacted under the Fourteenth Amendment and aimed at eliminating a classification based on age, where the majority emphasized that the particular discrimination -- age -- had not been identified as suspect. Id. at 117, 126-29 (Black, J.); 152, 205-09 (Harlan J.); 281, 293-96 (Stewart, J., with Burger, C.J., and Blackmun, J.). Indeed, this Court has since held that age is not a suspect classification, see Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976); this was reaffirmed by the dismissal for want of a substantial federal question of Maresca v. Cuomo, 475 N.E.2d 99, 485 N.Y.S. 2d 724 (N.Y. 1984), app. dismissed, 474 U.S. 802 (1985), holding that the mandatory retirement of state court judges does not violate the Fourteenth Amendment.

8/ The amici States do not necessarily disagree with this conclusion; it is the purpose of this brief, however, to address the broader consitutional issues.

9/ See also EEOC v. State of Illinois, 721 F. Supp. 156 (N.D. Ill. 1989); In re Stout, 559 A.2d 489 (Pa. 1989); Gondelman v. Commonwealth of Pennsylvania, 550 A.2d 814 (Pa. Cmwlth. 1988), aff'd on other grounds, 554 A.2d 896 (Pa. 1989) (all upholding state judicial mandatory retirement provisions against ADEA attack).

history of the ADEA for this Court to conclude that Congress did not intend to test the constitutional limits of its authority by intruding upon the selection and tenure of state judges.

CONCLUSION

The decision below should be affirmed in an opinion which reaffirms the constitutional principles protecting the authority of the States independently to govern themselves.

Respectfully submitted,

SCOTT HARSHBARGER
ATTORNEY GENERAL

COMMONWEALTH OF
MASSACHUSETTS

H. Reed Witherby
Special Assistant
Attorney General

Thomas A. Barnico
Assistant Attorney General
Counsel of Record
One Ashburton Place
Boston, MA 02108
(617) 727-2200

[SEE INSIDE FRONT COVER
FOR ADDITIONAL COUNSEL]

Dated: February 15, 1991

ADDENDUM

Colo. Const. Art. VI, § 23

Flor. Const. Art. 5, § 8

Hawaii Const. Art. VI, § 3

Minn. Const. Art. VI, § 8

Neb. Const. Art. V

Neb. Rev. Stat. § 24.708

New Jersey Const. (1947)
Art. VI, § 6, ¶ 3

North Dakota Const. Art. VI, §§ 7, 9

North Dakota C.C. §§ 27-07.1-01;
40-14.-01; 40-15-01

Pa. Const. Art. V, § 16(b)

Puerto Rico Const. Art. V, § 10

R.I. Const. Art. 10, § 4

S.C. Const. Art. V., §§ 3, 8 and 13

S.C. Code Ann. § 20-7-1370 B (Law.
Co-op. Supp. 1989)

Wyoming Const. Art. 5, § 5